IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 680

CORN PRODUCTS REFINING COMPANY, a corporation, and CORN PRODUCTS SALES COMPANY, a corporation,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

PARKER MCCOLLESTER,
GEORGE DEFOREST LORD,
Attorneys for Petitioners.

FRANK H. HALL,
SAMUEL A. MCCAIN,
SIDNEY S. COGGAN,
Of Counsel.

INDEX

Cases Cited

IN THE

Supreme Court of the United States

October Term 1944

No. 680

CORN PRODUCTS REFINING COMPANY, a corporation, and CORN PRODUCTS SALES COMPANY, a corporation,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONERS

Statement

For the most part, petitioners' main brief provides their answers to the statements and arguments contained in the brief for the Federal Trade Commission. There are, however, certain features of the Commission's brief which invite further short reply.

I

As to Basing Point Delivered Prices

Factual Matters

At pages 7, 8, 23 and elsewhere in the brief for the Commission, reference is made, as was done by the Commission in its report, to "phantom freight" or a "fictitious freight charge". However, such coined phrases do not prove facts and are often more likely to confuse or mislead than to clarify. The terms "phantom freight" or "fictitious freight charge" might dramatize the Commission's argument if petitioners purported to sell transportation or quoted f. o. b. factory prices and separate charges for transportation and delivery. However, such is not this case. Petitioners make no representation to their buyers that they are being charged a certain amount or portion of the total price for transportation as such. The prices which petitioners quote are single factor, delivered prices.

In discussing these prices and the effect of using Chicago as a basing point, the Commission's brief (p. 8) compares the resulting delivered prices at different destinations only with the delivered price at Chicago. This, however, gives a false impression of the factual situation and of the competitive aspect of the case. It was stipulated that the candy manufacturers at the various destinations listed are "competitively engaged in the sale of" candy (p. 198). This means, if it means anything, that each is in competition with one or more of the others. But it does not mean that all those at points other than Chicago are in competition only, or necessarily at all, with manufacturers in Chicago. Thus a candy manufacturer at St. Joseph, Mo., may be in competition with those in Kansas City. If there is a manufacturer at Lincoln, Neb., he may be in competition with a manufacturer at Sioux City, Iowa, etc. And quite possibly there is much keener competition between two candy manufacturers located near each other in their common nearby markets than there is between either of them and manufacturers

far away in Chicago. Especially may this be so in "selling such candies at only a small fraction of a cent per pound lower than a competitor" (R. 198) where differences in costs of ingredients must be of little importance compared with "proximity to markets and delivery of the finished candies" (R. 199). Therefore, in determining both whether differences in delivered prices resulting from adding freight rates from Chicago to a Chicago base price produce discrimination, *i. e.*, are the source of injury to some and advantage to others, and also whether such delivered prices adversely affect the competitive ability of any of the candy manufacturers, it is necessary to view the matter as a whole and consider how each would fare, not only in relation to manufacturers at Chicago as illustrated at pages 7 and 8 of the Commission's brief, but also in comparison with manufacturers at other points, if, as the Commission's order would require, delivered prices reflecting freight rates from Kansas City were substituted for the prices now paid.

This can be readily illustrated by a few examples, using the figures on page 7 of the Commission's brief.

Lincoln, Neb., and Kansas City, Mo., may well be in keener competition with each other in their common markets than either of them is with Chicago. Under the Chicago plus basis, the Lincoln manufacturer pays only 5 cents more for corn syrup than does his supposed Kansas City competitors. If Kansas City freight rates were employed, his price disadvantage as compared with Kansas City in buying corn syrup would be increased to 13 cents. The manufacturer at St. Joseph, Mo., would suffer even more from the Commission's order in comparison with his nearby competitors at Kansas City. They now pay the same delivered prices for corn syrup. Under the Commission's order the Kansas City manufacturers would have a price advantage of 9 cents. There is nothing in the record to show that from the standpoint of competition such differences between the candy manufacturers at St. Joseph and Lincoln and their supposed competitor at Kansas City would not

be far more serious, considering their natural markets, than the differences between the prices now paid by both of them and the prices paid by Chicago candy manufacturers.

Again, Sioux City, Iowa, now has a price advantage of 5 cents under Lincoln, Neb. If the freight rates from Kansas City were made the standard, the Sioux City manufacturer would pay 11 cents more for his corn syrup than his hypothetical Lincoln competitor.

A candy manufacturer at Fort Smith, Ark., now pays 4 cents less than one at Hutchinson, Kansas. Under the Commission's order, he would pay 9 cents more than his supposed Hutchinson competitor.

Can it be said that the candy manufacturers at St. Joseph, Mo., Lincoln, Neb., Sioux City, Iowa, or Fort Smith, Ark., are the victims of discrimination under the present method of determining the delivered prices which they pay, *i. e.*, that these prices injure them and prefer their competitors, as compared with the prices they would pay if the freight rates from Kansas City were used? Again, considering these examples, how can it be found on this record that the present prices impair the ability of any manufacturer to compete with his real competitor as compared with what his competitive situation would be under the Commission's order?

It must be remembered, moreover, that even as between candy manufacturers at other points and those at Chicago, price discrimination is alleged, not because the prices paid by the former are higher than the prices charged to Chicago manufacturers, but because they are higher by the amounts of the freight rates from Chicago rather than those from Kansas City. As between a candy manufacturer at Denver and one at Chicago, therefore, the question is not, as might be inferred from the Commission's brief, whether a price difference of 66 cents* in and of itself constitutes discrimination, but whether such a price difference is discriminatory when a difference of 56 cents would not be.

* The freight rate from Chicago to Denver is 66 cents, that from Kansas City to Denver is 56 cents (R. 197).

Furthermore, it must be realized that the table on page 77 of the Commission's brief does not tell the whole story as to freight rates. While to the Southwest and West the railroad freight rates from Kansas City are lower than from Chicago, nevertheless in going in other directions geography must inevitably reverse the picture. Hence, although the Commission here has seen fit to select points where the use of freight rates from Chicago has produced higher delivered prices than would have resulted from arriving at delivered prices by adding the freight rates from Kansas City to the same base price, nevertheless in other directions, where the freight rates from Chicago are less than those from Kansas City, the situation would necessarily be reversed.

These considerations emphasize how unwarranted it is to find price discrimination as a fact on the basis of no more facts than are stated in the stipulation here (R. 195-200), with no proof and no stipulation as to the facts concerning any particular candy manufacturers, no evidence where their principal markets are, no proof as to those with whom they compete or seek to compete in those markets, and no evidence as to what the real effects of their present delivered prices are upon the competition between them and their important competitors in their major markets and upon their businesses as a whole, in comparison with what that competition would be under delivered prices based upon Kansas City. In the light of these considerations, there is no basis for statements such as that on page 18 of the Commission's brief that

> "it is obvious that their area of competition is region-wide * * * and that their competition is effectively injured or prevented if arbitrary and important price discriminations are consistently conferred upon their competitors."

On pages 23 and 24 there are similar statements of unsupported assumptions regarding competition and the effect of petitioners' pricing method thereon.

Again, on page 40 counsel for the Commission remark that

> "the record in this case discloses a trend toward centralization on the part of petitioners' customers, some of whom moved to Chicago where they were able to take advantage of petitioners' price system."

We submit that there is neither a scintilla of proof nor a stipulation of such "a trend toward centralization". Even the Commission did not go so far as to find such a "trend".

In this same vein, as though it were an indication of the consequence or effect of petitioners' pricing method, despite the complete absence of proof of any causal connection, page 45 of the Commission's brief refers to a finding "that some candy manufacturers formerly located elsewhere than Chicago have subsequently moved to that city." This finding is only a half statement of the facts in the record. For the stipulation upon which the finding is based states that

> "some of such candy manufacturers were located at the cities listed in paragraph 3 before the construction and operation of respondents' [petitioners] Kansas City plant and some candy manufacturers formerly located at such cities have since 1922 relocated in Chicago." (R. 199)

This language requires the inference that *some* manufacturers likewise located at cities away from Chicago after petitioners' Kansas City plant went into operation, and it does not dispel the inference that some formerly located in Chicago have since moved elsewhere.

Moreover, this reference in the Commission's brief to what happened before and after the opening of the Kansas City plant emphasizes one factual aspect of the case which counsel for the respondent have failed to mention, presumably because it is unanswerable from their standpoint. This is the fact that all of the alleged consequences are really the result of the opening of the Kansas City plant and not of the pricing method. For if the Kansas City

plant had never been opened, the consequences would have been the same, whatever they were, under the pricing method contended for by the Commission as under that actually employed. And even now the entire basis for the allegation of violations of Section 2(a) would vanish if that plant should presently be closed. Having more than one plant cannot be discrimination in price within the prohibition of Section 2(a).

We submit that the manner in which counsel for the Commission have apparently felt compelled to embroider upon the record in order to provide the appearance of a factual foundation for their argument demonstrates how far short the record is of containing any substantial evidence to support a finding that petitioners' pricing practice results in discrimination against any particular candy manufacturer and in favor of any other within the intended prohibition of Section 2(a)* and emphasizes the arbitrary character of the Commission's decision in finding such discrimination.

---

* Mr. Utterback, for the House managers of the Conference Committee, in explaining the meaning and purpose of the bill, described the discrimination intended to be prohibited in the following language (80 Cong. Rec. 9416):

"In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill."

Comments on the Commission's Argument

A. *Whether differences in delivered prices at different destinations resulting from the basing point method constitute price discrimination within the meaning and prohibition of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.*

Very briefly the main points of petitioners' argument are (1) that basing point prices have been so long and so generally in use that the differences therefrom should not now be found unlawful unless clearly prohibited by the statute here involved; (2) that the language of the statute does not constitute a prohibition of such price differences; (3) that before the Robinson-Patman Act, Section 2 was not interpreted as making such price differences unlawful; (4) that there is nothing in the language of the Robinson-Patman Act to indicate an intention to change the law in this regard; and (5) that on the contrary the legislative history and Congressional debates indicate affirmatively an intention not to embrace price differences resulting from the basing point system within the prohibition of price discrimination.

It is submitted that the Commission's brief does not overcome the force of these arguments.

(1) The Language of the Act

On page 17 of their brief, counsel for the Commission refer to petitioners' brief as making "the sweeping argument that the statutory provision applies only to purchasers within the same community." Of course, that overstates or oversimplifies petitioners' position. The point sought to be made was that it is easy to see that differences in the prices charged to two buyers in the same town might constitute discrimination, but that the Act appeared to lay down no standard as to the differences which were prohibited or permitted between prices at different destinations and it was therefore necessary to look to the Congressional history of the measure to discover what Con-

gress intended. The only alternative would be to assume that any price difference at all would constitute discrimination, which would mean that the Act required uniform prices throughout the country. It is not contended by the Commission that this is the effect of Section 2(a). On the contrary, it appears to be assumed by the Commission (Brief, p. 34) that the nationwide uniform delivered prices are definitely lawful although they inevitably involve far greater disregard of differences in actual freight cost than can be claimed here.

The Commission (p. 21) seeks to find a standard of permitted and prohibited differences in prices which will support its position, in the language of Section 2(a) permitting

> "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

But this is not a standard which specifies the permitted "differentials" between prices at different destinations where the "methods or quantities in which such commodities are * * * sold or delivered" are the same. Such is the case here where we are concerned with sales and deliveries in tank car quantities shipped by railroad in tank cars.

In the last analysis, the Commission's contention that under Section 2(a) the differences in prices at different destinations must exactly reflect the differences in the freight rates actually paid* is equivalent to saying that

* This entire case has gone on the assumption that the freight rates actually paid on every shipment are the local rates from Chicago or Kansas City, whichever is the shipping point. In fact, as explained in the footnote, on page 61 of petitioners' main brief, this may not always be the case since grain and its products move to a large extent under so-called "transit". Hence, compliance with the Commission's views would not necessarily result in accurately reflecting the true freight on each shipment. However, the proceeding has not been complicated by injecting this feature.

goods must always be sold f. o. b. shipping point. Had Congress so intended it could have written such a requirement in clear and simple language, such as that of the provision at one time included in the bill as sub-paragraph 5 and then stricken out. The fact that no such language was left in the bill when it was passed argues convincingly against the Commission's claim that differences in prices produced by a uniform application of the basing point system constitute price discrimination intended to be prohibited by Section 2(a).

(2) The Interpretation of Section 2 Before the Robinson-Patman Amendment

In reply to our argument that the administration and enforcement of Section 2 of the Clayton Act prior to the passage of the Robinson-Patman Act demonstrate that basing point prices were not prohibited thereby, counsel for the Commission (p. 28) in one breath argue that old Section 2 was a "dead letter" and in the next that it did prohibit basing point prices but that it was not enforced as so doing "principally because of judicial misconstruction". According to counsel for the Commission, this judicial misconstruction was set right by the decision of this Court in *Van Camp & Sons Company* v. *American Can Company*, 278 U. S. 245. Since this decision was handed down in 1929 and no attempt to enforce the Act as prohibiting basing point delivered prices was made during the remaining eight years before the enactment of the Robinson-Patman Act, it must be assumed that the old act as correctly construed was deemed not to prohibit such prices.

Counsel for the Commission labor valiantly (pp. 25-27) to have it appear that "the Commission's greatest case", the *Pittsburgh Case*, 8 F. T. C. 1, affords an indication that old Section 2 of the Clayton Act was construed as prohibiting basing point prices. However, the Commission took no action to enforce its order in that case. An effort is made

to explain away this failure on the ground that no action was necessary because there was "a complete capitulation on the part of the defendants" (p. 27). However, even Professor Fetter, an avowed opponent of basing point prices, in "*The Masquerade of Monopoly*" (1931) refers to the Steel Corporation's answer as "half evasive and contemptuous, promising to comply with the decision so far as this was practicable (whatever that may mean)." This seems far different from "a complete capitulation". The fact is that basing point prices have continued in the steel industry and until the present case and the *Staley* case, in which the Commission has attacked basing point prices as unlawful only since the effective date of the Robinson-Patman amendment, no order of the Commission designed to prohibit basing point prices has been brought to the courts. It is a fair inference that no court action was taken to enforce the order in the *Pittsburgh Plus Case* because it was considered that Section 2 in its old form did not prohibit basing point prices.

That the Commission itself did not regard differences in delivered prices at different destinations resulting from the basing point method as coming within the prohibition of old Section 2 is indicated not only by its non-action but by the fact that since the decision in the *Pittsburgh Plus Case* the Commission has recommended on various occasions, as pointed out on page 37 of our main brief, the enactment of legislation to outlaw the basing point system. The Commission argues on page 28 of its brief that the various reports mentioned therein were intended to deal only with violations of the Sherman Act, but there is nothing in those reports to indicate that this is so. For example, the report to the Senate on Practices of the Steel Industry Under the Code, Senate Document 159 (73d Cong. 2d Sess. 1934) specifically states on page 1 thereof that the respondent would cover the question as to whether Section 2 of the Clayton Act was being violated by the persons and corporations adopting the Steel Code. Similarly, its "Report to the President with Respect to the Basing Point

System in the Iron and Steel Industry" in 1934, likewise discusses the *Pittsburgh Plus Case* and is not limited to a consideration of the basing point system solely in the light of the Sherman Act. Therefore the Commission's recommendation that the Code be amended to eliminate executive sanction of the basing point system, and to allow the Department of Justice or the respondent "to go forward in formal proceeding to test the basing point system" under the Sherman Act or the Federal Trade Commission Act, is highly significant in view of the lack of mention of the Clayton Act. In addition to the reports referred to in our main brief, it is noteworthy that in *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission,* 101 F. (2d) 620 (C. C. A. 6th, 1939), cited at page 22 of the Commission's brief, the Court quotes (p. 623) from the Commission's annual report for the year ending June 30, 1935, where it urged the enactment of a law "to clearly define the discrimination in price intended to be forbidden".

(3) The History and Interpretation of the Robinson-Patman Amendment

The Robinson-Patman Act was passed the next year after the Commission's report just referred to, and following debates and discussions in which its intended meaning and effect were more than usually set forth. Much more could be quoted from the Congressional discussion* and the reports than we have reproduced in our main brief but it would all show beyond any possible doubt (a) that differences in prices at different destinations resulting from the basing point method were not regarded by Congress as already prohibited by Section 2 as it previously was; (b) that for this reason, because some members of the House Committee (for example, Utterback and Crawford) favored outlawing basing point prices, paragraph (5) was written into

* 80 Cong. Rec. pp. 6346-6351, 6425-6436, 7759-7761, 8102-8140, 8223-8242, 9413-9422, 9902-9904.

the original bill;* (c) that because of opposition to any outlawing of basing point prices, paragraph (5) was eliminated; and (d) that the bill gained passage in both Houses of Congress on the representation of its sponsors that it did not prohibit basing point prices.

In the light of the outspoken statements of Congressional intent, we gladly adopt the language of the Commission's own brief (p. 23) that

> "There is no ground for contending that the language and expressed purpose of Congress should be denied effect * * *."

At pages 33 to 36 of their brief, counsel for the Commission endeavor to minimize the force of the rejection by Congress of paragraph (5) of the Patman Bill, which would have prohibited basing point prices, as a conclusive indication that Congress did not intend by the Robinson-Patman amendment to prohibit price differences resulting from the basing point method.

To this end the Commission's brief seeks other reasons than that given by the members of Congress themselves why paragraph (5) should have been eliminated. It is suggested first (pp. 34-35), that had paragraph (5) remained in the bill, it would have "required the use of the f. o. b. system of pricing" and the inference obviously intended is that the clause was eliminated because it was not the purpose of Congress to enforce "a compulsory f. o. b. price system". On this latter point we are in agreement with counsel for the Commission, but the suggestion would seem to support petitioners' position here rather than that of the Commission. This is so because a requirement that prices shall reflect actual freight is, in practical effect, a requirement that sales be made f. o. b. shipping point. Hence, if, as the Commission suggests, Congress intended no such require-

---

* This was the paragraph defining prices as

"The amount received * * * after deducting actual freight or the cost of other transportation."

ment, Section 2(a) should not be interpreted as supporting the Commission's order here in issue, whose enforcement would have the same practical effect as though paragraph (5) had remained in the law.

On page 36 the further suggestion is made that the elimination of paragraph (5) was necessary because otherwise the provision entitling a producer to show that his prices were made in good faith to meet the "equally low price of a competitor" would "have been rendered nugatory". We fail to follow this reasoning. Paragraph (5) was a definition of "price", and it would appear that the provision as to meeting competition would still afford a defense to alleged discrimination in price.

However, there is no basis for seeking such hypothetical explanations for the elimination of paragraph (5) when the statements in Congress explain definitely why it was stricken from the bill. The reason was simple and direct. Congress did not want or intend by the Robinson-Patman amendment to make it unlawful to sell at delivered prices produced by the basing point method.

It is only with Section 2(a) as inserted in the Clayton Act by the Robinson-Patman amendment that this case is concerned. Therefore, whether basing point prices may be regarded as economically sound or unsound or whether under certain circumstances the maintenance of basing point prices may violate some other statute are matters which are beside the point. Congressman Miller, Chairman of the House committee in charge of the Robinson-Patman bill, summed up the matter when he said that he did not approve of the basing point practice but submitted the proposal for the elimination of paragraph (5) at the request of the Committee on the Judiciary with the idea that the Congress should deal with the basing point practice in a separate bill (80 Cong. Rec. 8224).

The fact that none of the separate bills, referred to at pages 43 and 44 of petitioners' main brief, designed to prohibit basing point prices, ever reached enactment is an indication that despite Congressman Miller's individual views it has not been the purpose of Congress to make bas-

ing point prices unlawful. The view that basing point prices in and of themselves had not been prohibited by the Clayton Act, as amended by the Robinson-Patman Act but were unlawful only when the result of a combination or conspiracy in restraint of trade, was reflected in the final report and recommendations of the Temporary National Economic Committee (Senate Document 35, 77th Cong. 1st Session, p. 33), which recommended the enactment of legislation to prohibit the basing point system in order to avoid the "costly process" of eliminating the system "under existing law" (obviously referring to the anti-trust laws). The report of this committee echoed the advice given to it by the Assistant Chief Counsel of the Commission, Mr. Walter B. Wooden, who testified before the committee on January 30, 1940 as follows (Verbatim Record of Proceedings of T. N. E. C. Vol. 11, p. 400):

> "In closing, I would merely like to say that it seems to me the peculiar province of this Committee is to consider whether legislation outlawing the basing point system should not be recommended. As the situation is now with the outcome of any basing point case depending upon the interpretation of the law and the facts under *theories of conspiracy and concerted action which are necessary to make the law applicable,* I think, it requires an enormous expenditure of time and effort and labor in establishing in an adversary proceeding each particular industry and that the facts are in that industry regarding the basing point system." (Italics ours.)

B. *Whether there was substantial evidence to support a finding that petitioners' pricing practice has the effect upon competition essential to a violation of Section 2(a).*

On page 42, the Commission's brief refers to petitioners as contending "that the Commission's findings (directly based upon stipulated facts) are insufficient to support its conclusion" with regard to the effect of price differences on the competitive situation, and on the next page of the brief it is argued that to accede to this con-

tention would be "to draw an inference from the undisputed facts contrary to that drawn by the Commission and sustained by the court below". It is argued that this would contravene the rule laid down in *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 53, 63, that "the weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the Commission".

We certainly do not want the Court to approach this phase of the matter with the impression that petitioners contend simply that the Commission's findings are not sufficient to support its conclusions and take no exception to the findings themselves. Petitioners very definitely contend that even such findings as the the Commission has made on this question are *not* "directly based upon stipulated facts" and we submit that the inferences which the Commission has drawn are not "the inferences reasonably to be drawn from them."

Again, on page 46, the Commission's brief inadvertently misstates petitioners' position when it refers to "the undisputed findings in the instant case". Petitioners do dispute the findings as not only insufficient to sustain the conclusion but as unsupported by the evidence.

The Commission's brief makes no reply to the petitioners' argument that the Commission, having nothing in the record as to the consequences of the pricing practices except a stipulation of ultimate facts, was bound by that stipulation according to its own terms and that it was improper for the Commission to indulge in inferences therefrom, not stated in the stipulation itself.

The situation here is that the parties entered into a stipulation as to the utmost inferences which they would agree could be drawn from testimony of witnesses if hearings were held and witnesses examined. This case should be decided on the basis of this stipulation as the only findings. However, the Commission proceeded to embroider upon the stipulation. Then the court below drew inferences from the Commission's inferences and counsel for

the Commission in their brief suggest still further inferences from the comments of the lower court. We submit that in determining whether a violation of Section 2(a) has been established it is necessary to go back to the stipulation as embodying all of the findings which could be made with regard to the competitive angle of the matter. And the statements in that stipulation do not constitute findings that the petitioners' pricing practice has the effects upon competition essential to a violation of Section 2(a).

C. *The absence of finding or proof of knowledge by any purchasers.*

Turning to petitioners' argument that no violation of Section 2(a) can be found since there is neither a finding by the Commission nor any proof to support a finding that any purchaser who received the benefit of the alleged price discrimination did so *"knowingly"*, the Commission's brief (p. 49) suggests that the word "knowingly" was inserted in the statute through error. The fact is, however, that the word is there. Certainly it was deliberately inserted, for its inclusion was made the subject of special mention in the committee's report.

The House managers of the bill in their report No. 2951, 74th Congress, 2d Session, pages 5-6, stated, with reference to the insertion of the word "knowingly":

> "Its purpose is to exempt from the meaning of the surrounding clause those who incidentally receive discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement for them on the part of the buyer or seller, and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination."

Certainly on the record here the candy manufacturers purchasing from petitioners come within the intended exemption as so described.

To overcome the lack of proof of knowledge, the Commission's brief repeats (p. 48) the lower court's argument or assumption that petitioners' pricing system is "well known to the public". However, where knowledge is made an essential part of a prohibited act, it is something that cannot be assumed or taken for granted. *Gates* v. *Jones National Bank*, 206 U. S. 158 (1906). In that case this Court said (p. 180) that it was clearly established

> "that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional."

Moreover, on the stipulated facts, no purchaser, even if familiar with petitioners' pricing methods, can thereby be said to have knowledge whether or not he is the recipient of the benefits of alleged discrimination because he cannot know the factory from which shipment will be made, either to him or to a competitor (R. 195-196). This is emphasized by the fact that under the customary terms, purchasers have thirty days after orders are placed in which to call for delivery (R. 40, 205). The Commission's brief attempts to meet this point (p. 49) by arguing that the Commission found that actual sales occur not when orders are placed but when delivery is made. However, it is when the orders are placed that the price is fixed and it is the buyer's knowledge then which counts.

D. *The Commission's failure to give effect to the situation resulting from the fact that petitioners have two plants, one at the basing point.*

It is difficult to believe that it was the intention of Congress in enacting the Robinson-Patman Act to require a concern having two plants, one at the basing point and the other at a different location, to charge different prices for the same product to two customers at the same destination dependent upon the manufacturer's election as to the plant from which delivery is made. It may well be that this was

one of the reasons which led Congress to strike from the Patman bill sub-paragraph (5) which would have had this result, and which caused the members of Congress in charge of the bill, in order to secure its passage, to give assurance that it would not affect the basing point method of determining delivered prices. Counsel for the Commission attempt to meet this argument at page 23 of their brief by asserting (a) that the statute would permit such discriminations; (b) that the customers would demand delivery from the nearest plant of petitioners; and (c) that such differentials would not have the adverse effect on competition specified by the statute.

The Commission, for the purposes of this present case, is, of course, forced to take position (a), but we wonder whether the Commission would adhere to that position, if the situation should arise elsewhere; (c) is an assumption only and appears incorrect, while (b) is contrary to the facts, as stipulated for the purposes of this case, that

> "whether such sales have been and are fulfilled by shipment from respondents' plants at Chicago, Illinois, or by shipments from their plant at Kansas City, Missouri, has depended and depends in each instance upon the conditions at these respective plants, and has been and is entirely within the judgment and control of respondents." (R. 195-196)

II

As to delayed bookings and deliveries and sales to tank wagon buyers.

Little reply is needed to the Commission's argument on these features of the case.

On pages 50 and 51, the Commission's brief attempts to answer petitioners' contention that the extensions of time for placing orders or for taking deliveries were matters of terms of sale and not of price and therefore did not come within the prohibition of price discrimination.

It is significant that the Robinson-Patman Act as originally drawn contained language expressly prohibiting discrimination in terms of sale as well as in price, and that the reference to terms of sale was stricken before the enactment of the bill (H. Rep. No. 2951 74th Cong. 2d Sess. p. 5). The Commission, page 51, quotes the Conference Committee report as indicating an intention "that the bill should be inapplicable to terms of sale except as they amount in effect to indirect discriminations in price within the meaning of the remainder of sub-section (a)". In one sense, all differences in terms of sale directly or indirectly accomplish differences in price. However, the expression "terms of sale" must have been deemed by Congress to have some more definite meaning and therefore effect must be given to its elimination. It is difficult to imagine what would be considered a term of sale if the period of time within which delivery is to be made is not to be so regarded.

One of the points stressed by petitioners in their assignments of error and main brief has been that, with regard to these alleged violations, there is no proof whatever as to the effect of the claimed discrimination upon competition. The subject of these particular alleged violations was entirely a matter of oral proof and no evidence was presented by the Commission with respect to the effect of the alleged discriminations upon competition. The Commission in its report attempted to make good this lack of proof by treating the stipulation entered into concerning basing point prices as applicable to these alleged incidents. We have argued that this was highly improper and unjustified.

At pages 53 and 54 of the Commission's brief, it is asserted in defense of its action that "The facts and law relevant to this question are precisely the same as those already discussed * * * with reference to the competitive effect of the price discriminations growing out of petitioners' basing point system of selling and need not be repeated here".

Certainly as to the facts this statement that they are "precisely the same" is without support in the record and incorrect. The questions regarding delayed deliveries and bookings concerned only buyers in the Chicago area. The stipulation regarding basing point prices had to do with prices charged to buyers due to the very circumstance of their locations in different cities away from Chicago.

Counsel for the Commission at page 54 argue that the stipulation was not confined to the basing point issue. Nevertheless, there can be no doubt among the counsel who actually participated in the trial and in the negotiations leading to this stipulation that it was intended to be so confined. It is true that at the opening of the stipulation it was stated that "if hearings were held and witnesses were called at such hearings to testify with reference to the matters alleged in Count I of the complaint as amended and respondents' answer thereto, such witnesses would testify", etc. However, the suggestion now made by counsel for the Commission that paragraph 6 of the stipulation (R. 198, 199), which is the portion of the stipulation relating to effects on competition, was intended to cover *all* matters alleged in Count I is disposed of by the fact that separate stipulations were entered into with regard to discounts and allowances to buyers of starch and feeds (R. 186-191, 191-194), dealt with at pages 55 to 58 of the Commission's brief, although the allegations concerning these transactions were likewise included in Count I of the amended complaint (R. 11). Moreover, by its own terms the stipulation would be violated if it were deemed to relate to deferred bookings and deliveries and to sales to tank wagon buyers, since it was expressly stated as part of the stipulation that no further evidence on the charge of discrimination in price covered by the stipulation would be presented to the Commission by either party (R. 199), whereas most of the evidence relating to these matters was offered by the Commission thereafter (R. 201-290). Finally, a fair reading of paragraph 6 of the stipulation, which

is the paragraph dealing with the effect on competition, plainly indicates that it was concerned only with the effect on competition of differences in prices resulting from the basing point method and had no relation to differences in prices charged for other reasons to buyers in the Chicago area (R. 198-199). Thus the stipulation refers to the "higher prices paid for such syrup by such candy manufacturers located in the cities enumerated other than Chicago, Illinois" and the reference to "higher prices" is necessarily to the prices listed in paragraph 3 (R. 196), which are the prices described in paragraph 4 as determined "by adding to the prices shown for Chicago * * * the then effective local freight rate from Chicago to destination." This was certainly not, and was not intended to be, a stipulation as the effect of delayed deliveries or sales in tank car quantities upon the competitive ability of buyers in the Chicago area. And there was no testimony as to such effect, if any.

On page 54, the Commission's brief refers further to the sales to tank wagon customers. It is sufficient to remark that the brief attributes to these transactions a relation to the case not given to it by the Commission in its decision, nor by the lower court.

III

As to discounts or allowances.

With regard to these transactions the Commission's brief on page 58 states "petitioners challenged none of the Commission's findings".

Most certainly the petitioners challenged the Commission's findings that there were violations of Section 2(a) in connection with these transactions. Petitioners' challenges of the Commission's findings and conclusions with regard to these transactions will be found at pages 504, 505 of the Record.

Moreover, counsel for the Commission (p. 58) describe petitioners as urging "that these allowances and discounts

have not been demonstrated by the Commission to have had a *substantial* effect on competition." This is an understatement. We submit that the stipulations afford no basis for a finding that the discounts and allowances have had *any* effect on competition between purchasers from petitioners and that on the authority of cases cited at pages 49 and 50 of petitioners' main brief, facts as to the effect on competition necessary to show a violation of the Act cannot be assumed without proof.

IV

As to the advertising arrangement with Curtiss Candy Company which is alleged to constitute a violation of Section 2(e) of the Clayton Act, as amended.

Petitioners submit that regardless of other features of the Curtiss transaction which are discussed in their main brief, it does not come within the terms of Section 2(e) in that the dextrose purchased by Curtiss is not a "commodity bought for resale, with * * * processing." We have argued that if language has meaning, the sale of candy in which dextrose is only one ingredient among others is not the resale of processed dextrose.

To meet this argument, the Commission's brief, at page 65, first cites cases in which the word "process" is used as a noun in a broad generic sense in connection with the patent laws. It does not follow, however, that "processing" and "process" have the same meanings. On page 66 the brief cites *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 422; *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. (2d) 438, certiorari denied, 305 U. S. 611; *Tasty Baking Co.* v. *United States*, 38 F. Supp. 844, certiorari denied, 314 U. S. 654; *Cincinnati Soap Co.* v. *United States*, 22 F. Supp. 141, as authorities concerning the mean-

ing of the word "processing". In connection with these cases, the brief states:

> "Likewise never challenged by the taxpayer or the courts, and specifically acquiesced in by the Congress, is the application of a tax on the 'processing' of coconut oil into shortening powder or soap. * * *
>
> "Not once has the suggestion been raised that the type of chemical alteration involved in these cases is not validly described as a processing."

As a matter of fact, the question in those cases did not turn on the meaning of the word "processing" as such, but rather on the construction of the term "*first domestic* processing", that is whether it meant the first "processing" after the goods were brought into this country or the first "processing" after the enactment of the taxing statute.

Moreover, the statute which imposed the tax contained the following provision (48 Stat. 763, § 602½):

> "For the purpose of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

The fact that in enacting this tax Congress found it necessary expressly to define the term "processing" as including, for the purposes of the statute, the *use* of a commodity in the *manufacture* or *production* of an article intended for sale would certainly seem to support the conclusion that in enacting Section 2(e) of the Clayton Act, where no such broad and sweeping definition was used, Congress did not intend to cover the situation where a commodity is "sold for use * * * in the manufacture or production of a different article intended for sale".

Perhaps confusion has been caused by emphasis upon the meaning of the word "processing" rather than upon the word "*resale*". After all, resale is the important word

and a transaction does not come within Section 2(e) unless it involves a commodity bought *for resale*. The prefix "re" in that word necessarily means that the same commodity which is sold in the original transaction must be the commodity which is involved in the resale. The sale of candy is not a resale of dextrose within any reasonable use of the English language. None of the cases cited in the Commission's brief go to this point.

With regard to the balance of the discussion of the Curtiss transaction in the Commission's brief, petitioners' arguments are set forth in its main brief except for pointing out that in considerable part the Commission's argument on this feature of the case rests, not upon the language of the statute, but upon the Commission's idea of what is required by public policy. Needless to say, it is the action of Congress which is determinative and not the views of the Commission.

CONCLUSION

The arguments in the brief for the Commission should not prevail.

Respectfully submitted,

Parker McCollester,
George deForest Lord,
Attorneys for Petitioners.

Frank H. Hall,
Samuel A. McCain,
Sidney S. Coggan,
Of Counsel.

February 26, 1945.